LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 27 1976

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-990

JOSEPH N. DAVIES and MURIEL G. DAVIES,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY,
and THE DAYTON POWER & LIGHT COMPANY,
Respondents,

and

JOHN T. NIEMAN and MARILYN G. NIEMAN,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY,
THE DAYTON POWER & LIGHT COMPANY,
UNITED STATES FARMERS HOME
ADMINISTRATION,
JENNINGS E. STILES and DOROTHY STILES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, BUTLER COUNTY, OHIO

BEIRNE & WIRTHLIN
C. R. BEIRNE
MICHAEL A. FULTON

2912 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 621-5370

Attorney for Respondents

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
COUNTERSTATEMENT OF PRE-TRIAL PROCEEDINGS	3
COUNTERSTATEMENT OF PROCEEDINGS ON THE MERITS	5
REASONS THE WRIT SHOULD BE DENIED	7
THE PETITIONERS WERE ACCORDED DUE PROCESS IN THE APPROPRIATION PROCEEDINGS PRIOR TO THIS APPEAL	15
SUMMARY	19

TABLE OF CASES

Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450 (1945)	18
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	15, 16
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1965)	15, 16
Brunny v. *Prudential Ins. Co.*, 151 Ohio St. 86, 84 N.E. 2d 504 (1949)	12
Butler County Citizens Committee, et al. v. *Dayton Power and Light Co., et al.*, — Ohio App. 2d —, — Ohio Op. 2d — (CA 74-06-0055, Decided June 16, 1975)	4
City of Oakland v. *United States*, 124 F. 2d 959 (9th Cir. 1942), *cert. denied* 316 U.S. 679 (1942)	17

Page

Communist Party of the United States v. *Subversive Activities Control Board*, 367 U.S. 1 (1961) 18

Dick v. *New York Life Ins. Co.*, 359 U.S. 437 (1959) .. 12

Emery v. *City of Toledo*, 121 Ohio St. 257, 167 N.E. 889 (1929) 9

Fuentes v. *Shevin*, 407 U.S. 67 (1972) 15

Ginn v. *Dolan*, 81 Ohio St. 121 (1909) 12

Greenhills Home Owners Corp. v. *Village of Greenhills, et al.*, 5 Ohio St. 2d 207, 215 N.E. 2d 403 (1966) 18

Mobile, J. & K. C. R.R. Co. v. *Turnipseed*, 219 U.S. 35 (1910) 12

Nashville I-40 Steering Committee v. *Ellington*, 387 F. 2d 179 (6th Cir. 1967) 19

Ohio Power Co. v. *Diller*, 18 Ohio App. 2d 167, 247 N.E. 2d 774 (Putnam Cty. 1969) 9

Pittsburg, C. C. & St. L. Ry. Co. v. *City of Greenville*, 69 Ohio St. 487, 69 N.E. 976 (1904) 9

Prentiss v. *Dittmer*, 93 Ohio St. 314, 112 N.E. 1021 (1916) 18

Sargent v. *City of Cincinnati*, 110 Ohio St. 444, 144 N.E. 132 (1924) 9

Strongsville v. *McPhee*, 142 Ohio St. 534, 53 N.E. 2d 522 (1944) 18

Thormyer v. *Irvin*, 170 Ohio St. 276, 164 N.E. 2d 420 (1960) 9

United States v. *Miller*, 317 U.S. 369 (1943) 17

Walker v. *City of Hutchinson*, 352 U.S. 112 (1956) .. 17

OTHER AUTHORITIES

	Page
Note, *Ohio's Uniform Eminent Domain Act: Transfer of Title and Possession,* 27 Ohio St. L. J. 525 (1966)	11
Chapter 163, Ohio Rev. Code	8, 9, 10, 19
Chapter 2709, Ohio Rev. Code	10
Section 163.09, Ohio Rev. Code	3, 10, 11
Section 2709.10, Ohio Rev. Code	10

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-990

JOSEPH N. DAVIES and MURIEL G. DAVIES,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY, and THE DAYTON POWER & LIGHT COMPANY,
Respondents,

and

JOHN T. NIEMAN and MARILYN G. NIEMAN,
Petitioners,

v.

THE CINCINNATI GAS & ELECTRIC COMPANY, THE DAYTON POWER & LIGHT COMPANY, UNITED STATES FARMERS HOME ADMINISTRATION, JENNINGS E. STILES and DOROTHY STILES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, BUTLER COUNTY, OHIO

COUNTERSTATEMENT OF THE CASE

The inaccuracies contained in the Petitioners' Statement of the Case require this Counterstatement including Counterstatements of the Pre-Trial Proceedings and the Proceedings on the Merits.

Contrary to the assertions of Petitioners, the trial court did not deny Petitioners the right to discovery of the facts necessary to prepare their case. (Petition, P. 6) In fact, Petitioners were accorded the unrestricted right to depose any and all officers, agents or employees of the Respondents and the unrestricted right to inspect any and all documents in the possession of Respondents, excepting only those documents which were precluded as part of Respondents' trial preparation material. Petitioners took full advantage of such discovery and engaged in an extensive series of depositions of the top-level officers and engineers in both utility defendants. In addition, Petitioners requested and were provided with numerous technical and official records, reports and documents of Respondents.

The following statement of Petitioners, appearing at page 6 of the Petition, is, on its face, both unintelligible and misleading:

> "The Court of Appeals, however, gave much greater weight than did the trial court to the presumption of legality of the private decision of the utility companies to appropriate the property, and it reversed the judgment, holding that the burden of proof was greater than that sustained by Petitioners."

This statement erroneously infers that the Ohio Court of Appeals failed to follow the provisions of Section 163.09, Ohio Revised Code, in ruling upon the presumptions and the burden of proof applicable to this appropriation proceeding. The Court of Appeals simply held that the Petitioners completely failed to adduce any competent evidence on the central question of necessity and that the reasons given by the trial court for denying appropriation of Petitioners' properties were based upon evidence that had nothing whatsoever to do with the only issue the trial

court had to decide; namely, whether it was necessary to acquire easements over the properties of Petitioners.

COUNTERSTATEMENT OF PRE-TRIAL PROCEEDINGS

During pre-trial proceedings, it was clear that the inflammatory and highly prejudicial allegations which Petitioners made in their answers to the appropriation complaints raised issues which had only a remote possibility of gaining any support from the personnel and records of Respondents. Furthermore, they bore little relationship to the basic question of the necessity of the line. For example, Petitioners charged that the proposed 345 KV (345,000 volts) transmission line would be injurious to the people, livestock, fish, crops, wild animals, migratory birds, and all other forms of life existing in the area where the line is planned to be constructed. Petitioners spent day after day taking the depositions of the companys' top officers and engineers, only to learn that 345 KV transmission lines are a safe, widely used and proven means of transmitting electricity. There are more than 25,000 miles of such lines in use in this country today.

The trial court did not enforce the literal provisions of Section 163.09, Ohio Revised Code, by requiring a hearing within 15 days following the filing of the answers to the Complaints, as implied throughout Petitioners' brief. Rather, the Court expanded the statutorily required timeframe for discovery and trial in order to permit Petitioners to engage in extensive discovery attempting to prove their unfounded assertions that it was not necessary to construct this important public improvement.

The trial court was aware of the fact that Petitioners were members of a very active organization of residents

living in the effected area. This organization had been formed more than a year and a half prior to trial for the express purpose of gathering information and attempting to find any means possible by which this proposed transmission line could be blocked. More than six months prior to the trial of this case, the citizens' organization had retained present counsel who thereupon filed an injunction suit against Respondents before Respondents were ready to file the appropriation suits. One of the attorneys who has been involved in that injunction suit as well as in this action is a former employee of the Respondent, Cincinnati Gas & Electric Company, and has had considerable work experience in the planning and operational aspects of high voltage transmission lines.

The prior injunction suit was ultimately dismissed on the pleadings at the trial court level and, following appeal, was remanded to the trial court for a full trial on the merits. *Butler County Citizens Committee, et al.* v. *The Dayton Power and Light Co., et al.*, —— Ohio App. 2d ——, —— Ohio Op. 2d —— (No. CA 74-06-0055, decided June 16, 1975). Surprisingly, however, even though the complaint in that injunction suit raised all of the same issues raised by Petitioners in this case (word for word in most instances), the property owners dismissed the action after it was assigned for trial in another county. (Dismissal entered December 1, 1975).

Petitioners' allegation that Respondents refused to produce an environmental report prior to trial is grossly false and misleading (Petition, P. 9). The truth is that the written report of the outside consultant had not even been made available to Respondents because it was in its final stages of completion during the summer of 1974. Furthermore, Petitioners were told time and time again that Respondents were relying primarily upon their own

extensive in-house study of the route of the line to establish its necessity and conformity to environmental requirements. The details of the in-house study had been fully disclosed to the Petitioners during pre-trial discovery. The outside consultant, Commonwealth Associates, Inc. of Jackson, Michigan, had been employed as an expert witness for the sole purpose of confirming the validity of Respondents' environmental investigation and conclusions.

COUNTERSTATEMENT OF PROCEEDINGS ON THE MERITS

Petitioners argue that they were denied the right to cross examine every member of Respondents' Boards of Directors, in what promised to be a repetitious and purposeless series of time-consuming depositions. Had Petitioners fully informed this Court, they would have acknowledged in their brief that they did in fact take the depositions of three of the Directors of the Respondent Cincinnati Gas & Electric Company (CG&E), and three of Dayton Power and Light Company's (DP&L) Directors. One of the Directors so deposed, testified that he was responsible for keeping the other Directors apprised of the progress of the transmission line. The other CG&E Directors whose depositions were taken, testified to what information they and the other Directors on the Board had relative to this transmission line, particularly during the period that the Resolutions to take Petitioners' properties were passed. The trial court and Respondents perceived very early in the case that the only reason Petitioners were demanding the depositions of each and every Director was to cause inconvenience and unnecessary harassment of the Respondents' policymaking bodies, rather than pursue a

good faith effort to develop facts. Moreover, Petitioners were well aware from the discovery witnesses that the Directors relied upon the companys' officers and employees to carry out the day-to-day functions necessary to plan, construct and operate the subject transmission line. The Ohio Court of Appeals thereafter agreed that reliance by the Board of Directors upon management for such tasks was in accordance with law. (Petition, PP. 24a-25a).

Petitioners' allegation that serious environmental defects of the proposed line were revealed by expert testimony of an architectural historian and a member of the Ohio Power Siting Commission is contrary to the facts revealed in the record (Petition, P. 6). The member of the Ohio Power Siting Commission admitted that he had no knowledge of how this line would be constructed or why the company chose the particular route that it did or what environmental safeguards would be employed. The architectural historian likewise had no knowledge of the proposed line, or its overall route, or of what environmental effects the line may or may not have.

The claim of Petitioners that Respondents concealed information relative to the demand trend (i.e. the peak amount of electricity consumed by the utilities' customers each year) until after the trial was completed, is also contrary to the facts. Petitioners were supplied with all of the information and documents which were then available to Respondents on this subject. Petitioners knew that the proposed line was planned based upon information available to Respondents *at least 3 years prior to the time that this case was instituted,* and they were fully supplied with that information. Because of the amount of time required to construct a new power facility and the transmission lines which must serve it, an immense amount of capital is committed many years in advance of construction

of such facilities, based solely upon the best information available at the time that the projects are planned. An isolated one year leveling off of demand obviously would not have been material to the Respondents' long range plans.

While it would serve no useful purpose to comment upon every inaccuracy contained in the Petitioners' brief, the material inaccuracies contained at pages 14 and 15 of their brief will be addressed fully in the next section herein.

REASONS THE WRIT SHOULD BE DENIED

The Petitioners persist throughout their brief in making the argument that this case involves a basic denial of the right of discovery, by virtue of the Respondents' alleged concealment of evidence and refusal to allow meaningful discovery. The following list of the utilities' personnel that the property owners deposed does, by itself, overcome Petitioners' empty facade of unfairness. The persons deposed include:

B. John Yeager, President, Director,

Miles J. Doan, Senior Vice-President, Director,

William H. Dickhoner, Executive Vice-President, Director,

Walter J. Ott, Vice-President, Rate & Economic Research,

William T. Woodrow, Economist,

Robert P. Wiwi, Engineer, Electrical Operations

Robert D. Swanson, Principal Transmission Engineer,

John E. Grote, Manager, Electrical Planning Department,

from the Cincinnati Gas & Electric Company and,

Robert B. Killen, President, Director,

Dwight Garber, Vice-President, Service Gas & Divisions Operations, Director,

Morton T. Lewis, Vice-President & Treasurer, Director,

Everett D. Smith, Group Vice-President,

Richard F. H. Wessel, Manager, Engineering Division,

Louis C. Cobb, Manager, Regulatory Affairs,

from the Dayton Power & Light Company. The property owners thus deposed both Presidents of the companies and a total of six vice-presidents, as well as the top ranking electrical engineers having operational responsibility for the planning and construction of the transmission line. Such discovery was provided even though no formal subpoenas or notices of any kind were ever issued to Respondents' personnel. There are probably few cases involving appropriations of property, or any other type of civil litigation, wherein so many high ranking officers and directors of two corporations were subjected to such probing and in-depth discovery. The discovery was terminated only when the property owners counsel declared that they had no further witnesses they wished to depose. In addition, a substantial amount of documents were produced upon request without subpoenas.

Petitioners assert that the burden of proof placed upon the property owner is so strong that it is virtually impossible to overcome (Petition, P. 26). They contend that placing the burden of proof upon the property owner to show an abuse of discretion, and the establishment of a presumption of good faith in favor of the appropriating authority in determining the necessity for the appropriation amounts to a radical change in Ohio eminent domain law, and that Chapter 163, of the the Ohio Revised Code has

had a devastating effect on the property owners of Ohio (Petition, P. 23). These assertions are contrary to the history of eminent domain law in Ohio.

To understand the rationale of Chapter 163 which became effective in 1966, it should be understood that prior to this revision in the Ohio condemnation statutes, the only issue which could be litigated was the amount of compensation. The property owner was not even permitted to raise the issue of public necessity in the appropriation proceeding because that was considered to be a non-justiciable political question. In order to raise issues other than compensation, the landowner was required to bring a separate action for injunctive relief; but the only issues to be determined in this separate suit were abuse of discretion, fraud and bad faith. And, as plaintiff to such suit, the landowner had the burden of proof of the validity of his allegations against the public bodies by the degree of proof required in actions for an injunction. *Pittsburg, C. C. & St. L. Ry. Co.* v. *City of Greenville,* 69 Ohio St. 487, 69 N.E. 976 (1904); *Sargent* v. *City of Cincinnati,* 110 Ohio St. 444, 144 N.E. 132 (1924); *Emery* v. *City of Toledo,* 121 Ohio St. 257, 167 N.E. 889 (1929); *Thormyer* v. *Irvin,* 170 Ohio St. 276, 164 N.E. 2d 420 (1960).

A leading case authority in Ohio Eminent Domain law is *Ohio Power Co.* v. *Diller,* 18 Ohio App.2d 167, 172-3, 247 N.E.2d 774, 778-9 (Putnam Cty. 1969). There, the Court described the history of Chapter 163 briefly as follows:

> "In the case of *Emery* v. *Toledo* (1929), 121 Ohio St. 257, 264, the Supreme Court said:
>
> > '* * * This court, in *Sargent* v. *City of Cincinnati,* 110 Ohio St. 444, 144 N.E. 132, followed *P., C., C. & St. L. Ry. Co.* v. *City of Greenville,* 69

> Ohio St. 487, 69 N.E. 976, in holding that in a proceeding to assess compensation for taking private property by a municipality for public use the only issue to be tried is the value of the property, and, further, that the question of public need and the extent of that need is a political question, and not justiciable. This doctrine is universal. It has been so declared in *Shoemaker* v. *United States*, 147 U.S. 282, 298, 13 S. Ct. 361, 37 L. Ed. 170, and *Sears, Trustee* v. *City of Akron*, 246 U.S. 242, 38 S. Ct. 245, 62 L.Ed. 688. * * *'
>
> * * *
>
> "*We believe that Section 163.09 (B), Revised Code, merely codified the law as it had existed previously in relation to the necessity for the appropriation and the rebuttal of the necessity thereof.*" (Emphasis supplied.)

Also prior to the enactment of Chapter 163, corporations such as utilities which possessed the power to appropriate private property, did so according to the provisions of Chapter 2709, Ohio Rev. Code. Here, the burden was on the utilities to prove the right to make the appropriation, the inability to agree and the necessity for the appropriation. See Sec. 2709.10, Ohio Rev. Code. Thus, what the Ohio legislature accomplished with the passage of Chapter 163, was to merge into one statute (with the exception of highway appropriations under certain conditions), all proceedings for all appropriations of property for the public use whether by a public or private agency.[1] Chapter 163 was therefore the product of the

---

[1] The legislature had good reason to do this. The following passage from Vol. 27, Ohio State Law Journal, pages 525, 527-8, provides an excellent insight into the legislature's purpose.

"At the time of the enactment of the Uniform [Eminent Domain]

Ohio legislature's desire to modernize eminent domain procedures and to conform the substantive and procedural concepts of public appropriations to the realities of life in 1966 and beyond.

The portion of Section 163.09 (B) which the property owners seek to destroy reads as follows:

> " (T) he burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body,

---

Act there were fourteen separate, distinct, and complete procedures by which eminent domain could be exercised, making it difficult for landowners and appropriating agencies to know whether they were following the correct procedure. *Litigation over procedural technicalities was excessive. The number and variety hindered the evaluation of the procedures and encouraged their misuse. For these reasons the Ohio Legislative Service Commission and the Eminent Domain Committee of the Ohio Bar Association recognized the need for a uniform procedure which could be used whenever eminent domain was exercised. Furthermore, sentiment for reform was created by outdated procedures which produced bottlenecks in important public projects and which levied undue hardships on land owners. The recognition of the need for uniformity and reform culminated in the enactment of Ohio's Uniform Eminent Domain Act.* Whether the act permits the courts to perform properly their functions of ensuring just compensation and administering transfer of title and possession is yet to be determined.

"Since the fairness and efficiency of Ohio's Uniform Act are determined by balancing the competing interests of landowners and appropriating agencies, it is important that these interests be understood. If either party is able to use the proceeding as a club to coerce an unjust settlement, the purpose of the proceeding is defeated. Likewise, neither party should be afforded an unfair advantage in presenting its case to the jury. The appropriation agency is interested in immediate possession of the property so that it can begin improving and using the property without the delay caused by litigation. Owners, on the other hand, want adequate time to relocate. The agency seeks to minimize the cost of appropriation, while the landowner generally feels that the agency's offers are wholly inadequate. The task confronting the draftsmen of the Ohio act was to blend these competing interests into a fair and efficient proceeding." Note, *Ohio's Uniform Eminent Domain Act: Transfer of Title and Possession*, 27 Ohio St. L. J. 525 (1966) (emphasis supplied)

> counsel, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity."

Under Ohio law, prima-facie evidence is that creating a presumption of the validity of the fact asserted, which presumption may be rebutted by proof of facts which tend to show the contrary. *Brunny* v. *Prudential Ins. Co.*, 151 Ohio St. 86, 92-93, 84 N.E.2d 504 (1949); *Ginn* v. *Dolan*, 81 Ohio St. 121, 127, 90 N.E. 141 (1909). And, it has long been established in this country that no constitutional infirmities are occasioned by requiring a party to present evidence to overcome prima-facie evidence by the opposing party. *Mobile, J. & K. C. R.R. Co.* v. *Turnipseed*, 219 U.S. 35 (1910). All possible doubt as to the Constitutional validity of a presumption imposing a burden of persuasion of the non-existence of the presumed fact in civil cases, has been firmly and conclusively overcome. *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959).

Considerations of public policy arising from the character of appropriations for the public use, dictate that the presumption of necessity in favor of the utility is a fair one. As for example in the present case, the plaintiffs are engaged in a multi-million dollar project to meet a public need. Time of completion of the project is of the utmost importance. Undue delay will not only cost the companies and ultimately the consumers a great deal of money, it could also result in future power shortages, not to mention the deterring effect which it may have on the utilities' willingness to invest great sums of money for the future needs of the people of Ohio, and the effect on the willingness of the public to invest their money in needed

public projects. This case has already caused a delay of more than a year and a half.

Surely, it can be presumed that the utilities do not carelessly or arbitrarily spend millions of dollars for unnecessary plants and equipment. Keeping in mind the utilities' years of experience and depth of professional talent, the Petitioners should be affirmatively required to show that the utilities have acted arbitrarily, capriciously or fraudulently in committing a massive amount of capital for the construction of Miami Fort 7 (the new power generating facility under construction) and this line. Chapter 163 of the Ohio Revised Code is a reasonable statutory plan to provide for competing interests of the condemning authorities in meeting people's needs and the interests of the property owners affected by the appropriations.

Petitioners' assert that sixty-one percent of the original route for this transmission line, as selected by Respondents, was defective because it was ultimately changed. This statement is misleading. Changes were made to the route not because the original route was defective, but solely as a result of two factors. First, representatives of Respondents checked personally with each and every property owner whose property would be crossed by the proposed route and thereafter attempted to accommodate the wishes of the property owners by investigating the changes they requested and initiating those which were feasible. Second, changes from the original route are always made because situations arise that could not be foreseen at the time the route was initially planned and investigated. Respondents maintain the necessary flexibility to ensure that future changes bring about the best possible route after all the right-of-way work is completed. The fact is that many changes are effected out of consideration for the interests of property owners.

The instant appropriations proceedings were concerned solely with the necessity to take *only two parcels of property* out of all the properties affected by the proposed route. Thus, any changes made up and down on the route which did not affect the two properties sought to be appropriated were completely irrelevant to this proceeding.

The opinion of the Ohio Court of Appeals focused upon and completely disposed of the property owners' argument on this issue as follows:

> "It should be kept in mind that we are here dealing with two statutory actions consolidated for trial. They are based on the eminent domain statute. They are not equity cases where broad equitable relief may be requested and granted. They do not constitute class actions. They deal only with two parcels of land out of a possible hundred or more parcels along the line. What the situation may be ten miles down or up the line from the parcels of these two owners is hardly cause for finding an abuse of discretion by the Agencies as to the defendants' land. As far as the court can determine from the record there is nothing to justify the trial court's finding of an abuse of discretion in routing the line over these two parcels.
>
> "The trial court emphasized that about sixty percent of the line was changed from the original. Much of this was to meet the objections of the property owners involved. Had the Agencies remained adamant and refused to make changes where possible they no doubt would have been severely criticized for not listening to the landowners and such intransigence would have been used to show the Agencies' lack of concern for the owners. We do not feel that this affected the defendants because the route was not changed over their property after the cases were filed.
>
> "The trial court in its opinion strayed far afield when it was pointed out that with all the changes it would still be necessary to cross defendant's land; and the

trial court drew a parallel with the Criminal Search and Seizure law and said that this would prevent crossing defendants' land as Fruit of the poisoned tree. We fail to see the application of this reference to these cases." (Petitioners' brief, PP. 23a-24a).

THE PETITIONERS WERE ACCORDED DUE PROCESS IN THE APPROPRIATION PROCEEDINGS PRIOR TO THIS APPEAL.

Petitioners' reliance upon cases such as *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), is not helpful to their argument.

In *Fuentes* v. *Shevin, supra*, 407 U.S. 67, the defendants had purchased some household goods for which they had made payments under conditional sales contracts. Thereafter, the goods were repossessed by the seller pursuant to the State replevin statutes by the simple expedient of authorizing the local deputy sheriff to physically seize the goods from the purchaser's home.

This Court declared the State replevin statutes to be unconstitutional on the ground that before the goods can be repossessed, the State must afford notice and a prior opportunity for a hearing to the purchaser. Thus, prejudgment deprivations were the only evils that the *Fuentes* Court had under consideration. The Court said,

> "(T)he Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. 407 U.S. at 82.
>
> * * *
>
> "While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of

the basic right to a prior hearing of some kind." 407 U.S. at 86. (Emphasis added).

Likewise, in *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), this Court was only involved with deprivation of notice and a prior opportunity to be heard. There, a young girl was legally adopted by her step-father without any notice to her natural father or prior opportunity to be heard. The Court held that due process requires that before a father can be stripped of all legal relationship with his child, he must be given timely notice and a hearing. Obviously, neither of the above cases has any application whatever to the present appeal.

In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra,* 281 U.S. 673, the plaintiff was alleging violations of the Fourteenth Amendment by intentional and systematic discrimination against a class of property owners caused by the way in which the State of Missouri determined property tax assessments. Nowhere in the State proceedings had plaintiff been afforded a hearing on the merits of the complaint. The holding of this Court under the facts of *Brinkerhoff* was that plaintiff could not be discriminatorily deprived of property without being afforded some procedural remedy for the resolution of the property owners' claims.

We have no quarrel with the holdings of any of the cases cited by the Petitioners. The simple fact is that the present case does not involve a notice or hearing problem. The organization of landowners who have supported and financed the Petitioners in this case received notice several years ago that CG&E planned to construct the line through Butler County. Mr. and Mrs. Nieman and Mr. and Mrs. Davies themselves had known since the fall of 1972 of such plans. After pre-trial discovery, they

were given a full opportunity at trial to present every fact they were able to muster to support their claims.

These people spent more than two years of trial preparation to litigate the issues that they had been publicizing in the Butler County, Ohio community for weeks and months prior to trial. They prevailed in the trial court notwithstanding the fact that *they failed to produce one scintilla of evidence to prove any of the specific issues which they raised in their complaint.* The trial court's ultimate decision against Respondents was based upon alleged procedural deficiencies, which procedures had never been required in the history of eminent domain in the State of Ohio or elsewhere. The only requirement for due process under the Fourteenth Amendment of the Constitution in condemnation proceedings, is that the landowner whose property is being taken for public use *be provided with adequate notice of the condemnation and a hearing to determine just compensation. Walker* v. *City of Hutchinson,* 352 U.S. 112, 115 (1956); *United States* v. *Miller,* 317 U.S. 369 (1943); *City of Oakland* v. *United States,* 124 F.2d 959 (9th Cir. 1942), *cert. denied* 316 U.S. 679 (1942)

Furthermore, Petitioners' arguments concerning the provisions for answer time and expedited trial under Chapter 163 are academic and not pertinent to this appeal (Petion, p. 24). The fact is that these provisions were not applied to Petitioners' case. Petitioners have continually overlooked the well-established principle that Courts will decide constitutional issues only when required by the facts of the particular case.

> "No rule of practice of [the Supreme] Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.' (citations omitted) In part, this principle is based

> upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations." *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U.S. 1, 71-72 (1961).
>
> "A court will not exercise its power to determine the constitutionality of a legislative enactment where other issues are apparent in the record, the determination of which will dispose of the case on its merits." Syl. of *Greenhills Home Owners Corp.* v. *Village of Greenhills, et al.,* 5 Ohio St.2d 207, 215 N.E.2d 403 (1966).

More specifically, the courts will not pass on the constitutional validity of separate clauses of a statute, such as the property owners urge this Court to do, unless the particular mandate of each separate clause has been applied to the party alleging injury. *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450 (1945). The obvious reason is that constitutional issues should not be decided as hypothetical questions. Only those persons who can show that they have been prejudiced by an enactment are entitled to contest its constitutionality. *Prentiss* v. *Dittmer,* 93 Ohio St. 314, 322-23, 112 N.E. 1021 (1916); *Strongsville* v. *McPhee,* 142 Ohio St. 534, 53 N.E.2d 522 (1944). Petitioners can show no such prejudice.

SUMMARY

Petitioners in this case have raised broad and complex issues to support one simple objective that they have maintained throughout; namely, to have the proposed transmission line moved from their property to other persons' property. The Sixth Circuit Court of Appeals in *Nashville I-40 Steering Committee* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967), summarized the dilemma faced by public agencies in constructing public improvements as follows:

> "It would be virtually impossible to select a route for an interstate highway through a congested metropolitan area without working hardships upon many citizens. Appellants suggest possible alternative routes which they contend would avoid the unfortunate economic consequences which the proposed route will impose upon the North Nashville area. Alternative routes undoubtedly would impose hardships upon others. The minimizing of hardships and adverse economic effects is a problem addressing itself to engineers, not judges. The providing of just compensation to property owners falls within the purview of the laws of eminent domain." 387 F.2d at 185.

This case does not involve the constitutionality of a comprehensive statutory scheme, because many of the provisions of Chapter 163 under attack were not in fact applied to Petitioners and because the constitutionality of eminent domain proceedings has been well established by both this Court and the various State Supreme Courts. The Petitioners were given far more than ample means during pre-trial discovery by which they could gather evidence to attempt to prove their claims. As the opinion of the Court of Appeals discloses, the problem with the Petitioners' case is not caused by any alleged constitutional deficiencies in the Ohio statutes, but by a complete

lack of any evidence to support their claims, even though they were given a full opportunity to present such evidence.

The Ohio condemnation statutes as construed by the decision of the Ohio Court of Appeals effect a proper balance between the competing interests of appropriating authorities and property owners in providing for both discovery and a full trial on the merits, but, at the same time, requiring that they be accomplished within a reasonable amount of time under the circumstances.

Respondents respectively urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

BEIRNE & WIRTHLIN
C. R. BEIRNE
MICHAEL A. FULTON

2912 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 621-5370

Attorney for Respondents